

House of Representatives Vote to Update Small Business Act

Last week the House of Representatives passed H.R. 3867, "Small Business Contracting Program Improvement Act." The legislation is intended to bring greater integrity to the small business procurement process and to amend the benefits for certain segments of the small business community. Specifically, the House Small Business Committee believes that service-disabled veteran-owned small businesses, as well as women-owned small businesses are not receiving their fair share of government contracts. The Administration objects to several provisions and asserts that the creation of gender-based set asides and race or ethnically based preferences are vulnerable to Constitutional challenges.

The Small Business Act, 15 U.S.C. § 631 et seq. establishes small business procurement programs to ensure small businesses receive their fair share of government contracts. As most recognize, the procurement process can be quite complicated as the procurement rules and accompanying benefits vary depending on whether a small business entity fits into certain categories of the small business community, such as service-disabled veteran-owned small businesses, small disadvantaged businesses, historically underutilized businesses (HUBZone) small business concerns, or women-owned small business concerns.

Summarized below are the primary statutory changes for the affected small business categories.

Service-disabled veteran-owned

The legislation significantly benefits this category of small businesses. The Small Business Committee report, 110-400, which accompanied the legislation, states that service-disabled veteran-owned small business concerns (SDVOSBC) have not received their fair share of federal contracts. To remedy this shortfall, the legislation makes mandatory the award of sole source contracts to SDVOSBCs, as long as the contractor can perform the work. Currently, awarding such a sole source requirement is within the discretion of the contracting officer, and only after the contracting officer determined that was no reasonable expectation for competition among SDVOSBCs. Under this legislation, that discretion is removed, along with the requirement for contracting officers to determine whether competition is likely. The Act also increases, from \$5.0M to \$5.5M for manufacturing contracts and \$3.0M to \$5.1M for other contracts, the value of federal contracts eligible for SDVOSBC sole source contracts.

HUBZone

In another attempt (although indirectly) to increase contract opportunities for SDVOSBCs, the Act reduces contracting officers' authority to set aside competition for certain HUBZone contracts. The committee report states that by removing the mandatory set aside, there would arguably be more contracting opportunities for SDVOSBCs. As with SDVOSBCs, the limit for HUBZone sole source contracts increases from \$5.0M to \$5.5M for manufacturing contracts and \$3.0M to \$5.1M for other contracts. Under the guise of ensuring integrity, a HUBZone company could not receive a second HUBZone contract until the Administrator performed an on-site inspection. The Congressional Budget Office estimates that 5,000 on-site visits would need to be performed each year and would cost \$62M during the 2008-2012 period. Finally, the Act makes all small business eligible to protest the award contracts in HUBZone acquisitions.

8(a), Economically and socially disadvantaged

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The Act raises the net worth eligibility maximum standard for individuals to participate in the 8(a) program from \$250,000 to \$550,000, excluding equity in their home or business. The Administration believes opening the program to small business owners with a higher net worth is well beyond the original intent of the statute. A less controversial change is the extension of the program from 9 years to 10 years. The 10 years would be divided into a 6 year development phase and a 4 year transitional phase. The contract limit for set-aside contracts under this program would also increase from \$5.0M to \$5.5M for manufacturing contracts and \$3.0M to \$5.1M for other contracts. Finally, the Act expands the eligibility for all small businesses, rather than only other 8(a) firms, to protest contracts awarded in the 8 (a) program.

Small business concern owned and controlled by women

Under the legislation, contracting officers could restrict competition to women owned small businesses in industries where women owned businesses are under-represented. The legislation requires the Administrator of the SBA to conduct studies to determine the industries where women-owned businesses are under-represented and specifies certain industries as under-represented until the initial SBA study is completed. Similar to several of the other small business categories discussed above, interested party status for protests would be extended to all small businesses.

Finally, a contractor cannot receive a contract under any of these SBA preferences until the SBA Administrator performed a background check on the integrity of the business owners and officers.

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